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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 WILLIAM THOMAS MYERS  
11 CDCR #E-18846;

12 Plaintiffs,

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15 vs.

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17 LARRY SMALLS, et al.,

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20 Defendants.  
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Civil No. 08-1810 JAH (WMc)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN FORMA  
PAUPERIS*, IMPOSING NO INITIAL  
PARTIAL FILING FEE AND  
GARNISHING \$350 BALANCE  
FROM PRISONER'S TRUST  
ACCOUNT [Doc. No. 2];**

**(2) DISMISSING COMPLAINT FOR  
FAILURE TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2) AND 1915A(b)**

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24 Plaintiff William Thomas Myers, a state inmate currently incarcerated at Calipatria State  
25 Prison in Calipatria, California, proceeding pro se, has filed a civil rights Complaint pursuant  
26 to 42 U.S.C. § 1983. In this Complaint, Plaintiff alleges that his Eighth Amendment right to be  
27 free from cruel and unusual punishment was violated when he received inadequate dental care.  
28

1 Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a), instead he  
 2 has submitted a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
 3 [Doc. No. 2].

4 **I. Plaintiff’s Motion to Proceed IFP [Doc. No. 2]**

5 All parties instituting any civil action, suit or proceeding in a district court of the United  
 6 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 7 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only  
 8 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
 9 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,  
 10 remain obligated to pay the entire fee in installments, regardless of whether the action is  
 11 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

12 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a  
 13 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account  
 14 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
 15 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). From the certified trust account  
 16 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits  
 17 in the account for the past six months, or (b) the average monthly balance in the account for the  
 18 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.  
 19 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must  
 20 collect subsequent payments, assessed at 20% of the preceding month’s income, in any month  
 21 in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the  
 22 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

23 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.  
 24 § 1915(a)(1), *and* has attached a certified copy of his trust account statement pursuant to 28  
 25 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that he  
 26 has insufficient funds from which to pay a partial initial filing fee. *See* 28 U.S.C. § 1915(b)(4)  
 27 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or  
 28 appealing a civil action or criminal judgment for the reason that the prisoner has no assets and

no means by which to pay the initial partial filing fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”) to garnish the \$350 balance of the filing fees owed in this case, collect and forward them to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

Notwithstanding IFP status or the payment of any partial filing fees, the Court must subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief from a defendant immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a claim).

Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of process is made on the opposing parties”).

1        “[W]hen determining whether a complaint states a claim, a court must accept as true all  
 2 allegations of material fact and must construe those facts in the light most favorable to the  
 3 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194  
 4 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);  
 5 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s  
 6 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),  
 7 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261  
 8 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the  
 9 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*  
 10 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

11        In his Complaint, Plaintiff seeks to hold Defendants Schwarzenegger, the Governor of  
 12 California, James Tilton, the Former Secretary of the California Department of Corrections and  
 13 Rehabilitation (“CDCR”), Larry Smalls, Warden of Calipatria State Prison, and C.L. Robertson,  
 14 Chief Dental Officer liable in their “official capacities” for his claims that he was denied  
 15 adequate dental care in violation of his Eighth Amendment rights. (See Compl. at 2-4.) He does  
 16 not allege that these Defendants had any direct involvement in the denial of dental care. Instead,  
 17 it appears that Plaintiff is seeking to hold these Defendants liable in their supervisory capacity.  
 18 However, there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,  
 19 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be  
 20 individualized and focus on the duties and responsibilities of each individual defendant whose  
 21 acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844  
 22 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)).

23        In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each  
 24 individual Defendant which have a direct causal connection to the constitutional violation at  
 25 issue. See *Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040,  
 26 1045 (9th Cir. 1989). As a supervisor, a Defendant may only be held liable for the allegedly  
 27 unconstitutional violations of his subordinates if Plaintiff alleges specific facts which show: (1)  
 28 how or to what extent this supervisor personally participated in or directed Defendants’ actions,

1 and (2) in either acting or failing to act, the supervisor was an actual and proximate cause of the  
2 deprivation of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).  
3 As currently pleaded, however, Plaintiff's Complaint in no way sets forth facts which might be  
4 liberally construed to support an individualized constitutional claim against these Defendants.

5 Accordingly, Plaintiff's Complaint is dismissed for failing to state a claim upon which  
6 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). *See Lopez*, 203 F.3d  
7 at 1126-27; *Resnick*, 213 F.3d at 446, n.1. However, because Plaintiff could possibly cure the  
8 defects of pleading identified in this Order, he is hereby granted an opportunity to amend.  
9 *Lopez*, 203 F.3d at 1127 (leave to amend is generally appropriate unless the court has  
10 determined, "that the pleading could not possibly be cured by the allegation of other facts.").

### 11 **III. Conclusion and Order**

12 (1) Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]  
13 is **GRANTED**.

14 (2) The Secretary of California Department of Corrections and Rehabilitation, or his  
15 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing  
16 fee owed in this case by collecting monthly payments from the trust account in an amount equal  
17 to twenty percent (20%) of the preceding month's income credited to the account and forward  
18 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in  
19 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY  
20 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

21 (3) The Clerk of the Court is directed to serve a copy of this order on Matthew Cate,  
22 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,  
23 Sacramento, California 94283-0001.

#### 24 **IT IS FURTHER ORDERED** that:

25 (4) Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim  
26 upon which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b)(ii) & 1915A(b)(1).  
27 However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed"  
28 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted

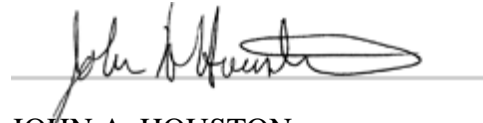
1 above. Plaintiff's Amended Complaint must be complete in itself without reference to the  
2 superseded pleading. *See* S. D. CAL. CIVLR. 15.1. Defendants not named and all claims not re-  
3 alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814  
4 F.2d 565, 567 (9th Cir. 1987).

5 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
6 may be granted, it may be dismissed without further leave to amend and may hereafter be  
7 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
8 (9th Cir. 1996).

9 (5) The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff  
10 Bovarie.

11 **IT IS SO ORDERED.**

12 DATED: November 25, 2008

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14 JOHN A. HOUSTON  
15 United States District Judge  
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